SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6211

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL.,
Petitioners,

v.

THE TEXAS HIGHWAY DEPARTMENT, ET AL., AND THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1974

No.

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL.,
Petitioners,

v.

THE TEXAS HIGHWAY DEPARTMENT, ET AL., AND THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Named Individual Members of the San Antonio Conservation Society, the Sierra Club and Save Our City pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 5, 1974 affirming summary judgment granted for the respondents by the United States District Court for the Western District of Texas.

OPINIONS BELOW

The opinion of the court of appeals is reported at 496 F.2d 1017 as is printed in the Appendix *infra*, pp. 1a-19a. The opinion of the district court is unreported and is printed in the Appendix *infra*, at pp. 24a-30a.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1974. (App., *infra*, p. 20a). A timely petition for rehearing, with a suggestion that it be reheard *en banc*, was denied on August 29, 1974 (App., *infra*, pp. 22a-23a)[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Section 154 of the Federal-Aid Highway Act of 1973 applies solely to the six-mile North Expressway in San Antonio and exempts that highway from federal environmental requirements. The question presented is whether the court below erred in refusing to review that statute under the Due Process Clause where the effect of § 154 is to deprive petitioners of environmental protection afforded to others throughout the country.

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[1] The question of whether petitioners are entitled to an award of attorneys' fees against the state was ordered reheard *en banc*. App. A, p. 22a. However, on all other issues rehearing was denied.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

Section 154 of the Federal-Aid Highway Act of 1973 provides:

> "Sec. 154. (a) Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project."
>
> "(b) The amount of all Federal-aid highway funds paid on account of sections of the San Antonio North Expressway in Bexar County,

Texas (Federal-aid projects numbered U 244 (7), U 244(10), UG 244(9), U 244(8), and U 244(11), shall be repaid to the Treasurer of the United States and the amount so repaid shall be deposited to the credit of the appropriation for Federal-Aid Highways (Trust Fund). At the time of such repayment the Federal-aid projects with respect to which funds have been repaid and any other Federal-aid projects located on such expressway and programed for expenditure on such project, if any, shall be canceled and withdrawn from the Federal-aid highway program. Any amount so repaid, together with the unpaid balance of any amount programed for expenditure on any such project shall be credited to the unprogramed balance of Federal-aid highway funds of the same class last apportioned to the States, respectively. The amount so credited shall be available for expenditure in accordance with the provisions of title 23, United States Code, as amended."

Also involved are:

(1) Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f). The same language appears as § 138 of the Federal-Aid Highway Act, 23 U.S.C. § 138.

(2) Section 102(2) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332.

Those provisions are set forth in the Appendix beginning at page 31a.

STATEMENT

1. Prior Proceedings

This controversy, which returns to this Court for the fourth time in four years,[2] is over the proposal to construct a six-lane highway, the North Expressway, through the Brackenridge-Olmos Basin Parklands located in San Antonio, Texas. The North Expressway was planned as a federal-aid highway, with the construction costs to be shared equally between the state and federal governments. The highway would require the use of between 116 and 250 acres of parkland and the excavation of an additional 130 acres within the parks. It would be a disastrous intrusion that would disturb the hundreds of thousands of people who use the parks annually.

The San Antonio Conservation Society and its individual members filed this action seeking to enjoin construction of the North Expressway on the ground that state and federal officials had failed to comply with federal statutes specifically designed to

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[2] *San Antonio Conservation Society* v. *Texas Highway Dept.*, 400 U.S. 939 (1970) (stay granted); *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Dept.*, 400 U.S. 961 (1970) (stay vacated); 400 U.S. 968 (1970) (petition for certiorari before judgment denied); *Texas Highway Dept.* v. *Named Individual Members of the San Antonio Conservation Society*, 403 U.S. 932 (1971) (petition for certiorari before judgment filed by the state denied); *Texas Highway Dept.* v. *Named Individual Members of the San Antonio Conservation Society*, 406 U.S. 933 (1972) (petition for certiorari by the state denied).

protect parklands such as those involved here. ***E.g.*** § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f); 23 U.S.C. § 138.[3] Later petitioners broadened their complaint to include allegations under the National Environmental Policy Act (NEPA), 42 U.S.C. 4331, *et seq.* After a prolonged administrative review, in 1970 the Secretary of Transportation approved two portions of the North Expressway that approached the parks from either side. The district court granted summary judgment for the federal and state defendants.[4]

The court of appeals reversed. 446 F.2d 1013 (5th Cir. 1971). It first found that there had been no compliance with § 4(f) of the Department of Transportation Act or with NEPA. No environmental impact statement had been prepared and no official had made any effort to study the "feasible and prudent" alternatives required by § 4(f).

In the court of appeals, the Texas Highway Department argued that it was committed to build the

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[3] Those provisions forbid the construction of federal-aid highways through significant parklands unless there are no "feasible and prudent" alternatives. See *Citizens to Preserve Overton Park Inc.* v. *Volpe*, 401 U.S. 402 (1971).

[4] After failing to obtain an injunction pending appeal from the court of appeals, petitioners sought a stay from this Court. It was originally granted, 400 U.S. 939, but subsequently vacated, 400 U.S. 961, and certiorari, before judgment, was denied. 400 U.S. 968. Subsequently, however, the court of appeals granted a stay and enjoined construction. The state sought review of the stay in this Court. Certiorari was denied. 403 U.S. 932.

North Expressway with state funds, if necessary, and that it should be permitted to do so without complying with federal environmental statutes. The court of appeals, finding that an attempt to circumvent federal law, held that the North Expressway must comply with federal law. 446 F.2d at 1027-28. It held that since Texas had negotiated for and obtained federal approval of the North Expressway and since federal participation had triggered the commencement of construction, the state was bound by federal law. Accordingly, the court of appeals remanded to the district court with instructions that construction be enjoined.

Following the remand, the Texas Highway Department, notwithstanding the decision of the court of appeals, attempted unilaterally to sever its relationship with the federal government. It formally terminated its request for federal aid and returned $1.8 million in federal aid which it had received for the North Expressway. The state then sought to have the district court dismiss the action. The district court denied the motion but certified as a controlling issue of law the question of whether the federal court had jurisdiction once the federal aid received for the North Expressway had been returned. The state petitioned for leave to take an interlocutory appeal, which was denied by the court of appeals. The state then sought certiorari in this Court, which was denied. 406 U.S. 933 (1972).

2. Legislative Relief

As a result of the decisions discussed above, it was firmly established that Texas could not construct the North Expressway, even with state funds, in violation of federal law. Unable to free itself from the requirements of federal law, Texas sought legislative relief in Congress.

Initially, two bills, cast as general amendments to the Federal-Aid Highway Act, were introduced. H.R. 15426, 92nd Cong., 2nd Sess. (1972); S. 3751, 92nd Cong., 2nd Sess. (1972). Those bills would have allowed states to terminate federal-aid relationships on particular highways by returning funds received from the federal government. Texas would have come within the provisions of those bills and would have been permitted to withdraw the North Expressway from the federal-aid system. However, Congress did not adopt general legislation as proposed in S. 3751 and H.R. 15426. Instead it adopted § 154 of the Federal-Aid Highway Act of 1973, Pub. L. 93-87, set forth *supra*, pp. 3-4, which is specifically limited to the San Antonio North Expressway. That section provides that upon the return of federal funds received for the North Expressway (which actually had been returned prior to the passage of the legislation), the North Expressway shall "cease to be a Federal-aid project."[5]

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[5] The legislative history of § 154 is found in *Hearings on S. 502 Before Subcomm. on Transportation of the Senate Public Works Comm.*, 93rd Cong., 1st Sess. 372-481 (1973);

3. Proceedings Below

Following enactment of the Federal-Aid Highway Act of 1973, the state and federal officials moved for summary judgment on the ground that § 154 exempted the state from compliance with federal environmental laws. In opposition, petitioners argued, *inter alia*, that § 154 violated the Due Process Clause of the Fifth Amendment and the equal protection standard incorporated into that clause because, by restricting the statute to the North Expressway, Congress deprived petitioners of the protection of federal environmental statutes to which all others throughout the country are entitled. The district court rejected that argument holding that the rights involved were statutory rights which could be abrogated by statute even though on a selective basis. Accordingly, it dismissed the action. App. p. 30a.

The court of appeals affirmed. In finding that § 154 was constitutional, it held that since Congress established the Federal-Aid Highway System, it could

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Hearings on 1973 Highway Legislation (Future Highway Needs) Before Subcomm. on Transportation of the House Public Works Comm., 93rd Cong., 1st Sess. (1973); S. Rep. No. 93-61, 93rd Cong., 1st Sess. (1973); 119 Cong. Rec. S 4934-43 (daily ed. March 15, 1973); 119 Cong. Rec. H 7418 (daily ed. Aug. 3, 1973).

There was extensive consideration of the same provision in 1972. *See* S. Rep. No. 92-1081, 92nd Cong., 2nd Sess. (1972); H.R. Rep. No. 92-1443, 92nd Cong., 2d Sess. (1972); 118 Cong. Rec. S 14839-46 (daily ed. Sept. 13, 1972); 118 Cong. Rec. H 9276-79 (daily ed. October 5, 1972).

decide what roads were to be a part of that system. Since it decided that the North Expressway was to be terminated as a federal route, federal environmental laws no longer applied. App. pp. 15a-16a.

REASONS FOR GRANTING THE WRIT

The issue raised here is an important issue of federal law which has not been, but should be, determined by this Court. Section 154 of the Federal-Aid Highway Act of 1973 was enacted for the specific purpose of exempting the six-mile North Expressway from federal environmental statutes; it has no application to the hundreds of thousands of miles of federal-aid highways throughout the United States. Although the statute deprives petitioners of environmental protection afforded other citizens throughout the United States, the court below refused to review the validity of § 154 under the Due Process Clause and the equal protection standard contained in that clause.

The holding below is not only inconsistent with the decisions of this Court, but it sanctions a potential loophole in environmental legislation.[6] The type of "special" legislation involved here has been so abused on the state level that it has been constitutionally

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[6] Section 154 was opposed by both the Council on Environmental Quality and the Environmental Protection Agency. 118 Cong. Rec. 32629-30 (1972); 118 Cong. Rec. 33828 (1972); 119 Cong. Rec. S 4936 (daily ed. March 15, 1973).

prohibited in at least thirty-six states.[7] The holding below should be reversed so that the constraints of the Due Process Clause will prevent widespread abuse on the federal level. Although the issue arises here in the context of the Federal-Aid Highway Act, NEPA and other environmental statutes, its implications extend to all federal programs.

There is no question that Congress could have exempted all federal-aid highways from federal environmental statutes. Likewise it could have exempted such highways where, as here, the state agreed to refund the federal aid received and to proceed with state funds.[8] Indeed, it might have constitutionally exempted federal-aid highways on some other basis so long as the statute operated uniformly throughout the United States.[9] But where Congress restricts the

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[7] "Thirty states prohibit the enactment of a special law where a general law can be made applicable, and six states prohibit special laws under any circumstances in any of certain widely varying but enumerated fields." Sands, *Statutes and Statutory Construction* 135 (4th ed. 1973).

The Texas Constitution prohibits "any local or special law authorizing . . . the laying out, altering or maintaining of roads, highways, streets or alleys . . ." Art. 3, § 56.

[8] As first introduced, the legislation involved here was cast in general terms applicable nationwide. See *supra*, p. 8.

[9] For instance, Congress might have exempted highways for which the right-of-way was purchased or construction begun prior to the enactment of the environmental statute involved. Likewise it might have exempted all federal-aid projects lying entirely within the boundaries of the city if the city requested such an exemption.

effect of its exemption to one six-mile highway, it no longer acts "with an even hand." [10]

This Court had held that "[t]erritorial uniformity is not a constitutional requisite." *Salsburg* v. *Maryland*, 346 U.S. 545, 552 (1954). Nevertheless, distinctions based purely on geographic area are not immune from examination under the equal protection standard. That is clear from *Salsburg*, 346 U.S. at 553-54, as well as *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 231 (1964). *Cf. Mathis* v. *North Carolina*, 266 F. Supp. 841, 847 (M.D. N.C. 1967) *noted* in 81 Harv. L. Rev. 890 (1968); Horowitz and Neitring, *Equal Protection Aspects of Inequalities In Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A. L. Rev. 787 (1968).

In order to pass constitutional muster, a statutory classification must be "rationally related to a legitimate governmental interest." *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533 (1973). Congress may not deny benefits to one group which it grants others who stand on an equal footing. *Jimenez* v. *Weinberger*, 41 L.Ed 2d 363, 371 (1974). The equal protection clause "imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager*, *supra*, at 308-09.

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[10] *Rinaldi* v. *Yeager*, 384 U.S. 305, 311 (1966).

However, the courts below refused to review § 154 under the Due Process Clause to determine whether it met even the most lenient equal protection standards. The district court took the position that since the rights involved here were statutory, they could be abrogated by statute, no matter how arbitrary the exemption might be. It did not review § 154 to determine whether it was rationally related to any governmental interests. The court of appeals took a similar approach. It held that since Congress enacted the environmental legislation involved here as well as the highway program, it could exempt specific roads from the environmental statutes. Like the district court, it refused to review § 154 under the Due Process Clause.[11]

The failure of the court of appeals to review § 154 under the Due Process Clause was critical because there is no rational basis on which to treat the North Expressway differently from other federal-aid highways in the United States. The legislative history reveals that two factors were instrumental in the enactment of that section. First, the planning and acquisition of right-of-way for the North Expressway began prior to the enactment of § 4(f) of the

[11] The court of appeals also attempted to justify § 154 on the ground that the federal environmental laws were intended to apply only to federal projects and the North Expressway was now a state project. The circularity of that argument is obvious. The North Expressway is a state project only if § 154 is constitutionally valid. Yet the validity of that section is the very point at issue.

Department of Transportation Act and NEPA, and prior to this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).[12] Secondly, the city and state agreed to construct the North Expressway, which lay wholly within the boundaries of San Antonio, with state and local funds rather than federal aid.[13]

While those factors might have supported general legislation to exempt highways from environmental statutes where the highway project was initiated prior to enactment of a statute and where the state and local governments agreed to finance the highway, they do not support, nor do they provide a rational basis for, a statute which applies only to the North Expressway. It is clear that there are numerous similar disputes over highways in other cities.[14] There is no justification for depriving pe-

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[12] *E.g.* 118 Cong. Rec. S 14842 (daily ed. September 13, 1972); 119 Cong. Rec. S 4937-40 (daily ed. March 15, 1973); S. Rep. No. 93-61. The tenuous nature of this argument is revealed by the fact that the legislative history of § 4(f) discloses that it was inspired by the threat to construct the North Expressway through the Brackenridge-Olmos Basin parks, and this very controversy was discussed in detail by the sponsor of § 4(f), Senator Yarborough of Texas, 114 Cong. Rec. 24036-37 (1968); *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Dept.*, 446 F.2d 1013, 1021, n. 14 (5th Cir. 1971).

[13] *E.g.* 119 Cong. Rec. S 4936-41 (daily ed. March 15, 1973); S. Rep. No. 93-61, 93rd Cong. 1st Sess. 23 (1973).

[14] The Acting Chairman of the Council on Environmental Quality, in opposing the bill, stated: "We know of no basis

titioners of benefits and protections afforded to the persons affected by those highways.

Under the holding below, the Due Process Clause has no application to a statute which grants an exception to a nationwide federal program where the exception deprives a small group of individuals in one locality of statutory protection afforded to all other citizens. By not reviewing the legislation under established equal protection standards, the court be-

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for distinguishing the San Antonio project from many similar highway projects which must presently comply with provisions of NEPA and § 4(f) of the Department of Transportation Act." 118 Cong. Rec. 32629-30 (1972); Senator Buckley pointed to numerous similar disputes. S. Rep. No. 93-61, 93rd Cong., 1st Sess., 54-55 (1973).

There are many reported cases in which environmental statutes have been applied to highways which were initiated prior to the legislation. *E.g., Arlington Coalition on Transportation* v. *Volpe*, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); *Nolop* v. *Volpe*, 333 F. Supp. 1364 (D. S.D. 1971); *Morningside-Lenox Park Assn.* v. *Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971); *Committee to Stop Route 7* v. *Volpe*, 346 F. Supp. 731 (D. Conn. 1972).

Likewise, there are instances in which state and local governments, after receiving federal approvals, have expressed a willingness to fund controversial highways in order to free themselves from federal law, but have been prevented from doing so. *E.g., Thompson* v. *Fugate*, 347 F. Supp. 120 (E.D. Va. 1972); *Sierra Club* v. *Volpe*, 351 F. Supp. 1002 (N.D. Calif. 1972); *Cf. La Raza Unida* v. *Volpe*, 337 F. Supp. 221 (N.D. Calif. 1971), *aff'd* 488 F.2d 559 (9th Cir. 1973); *cert. denied*, —— U.S. ——, 42 U.S.L.W. 3691 (1974) (state officials said it was "highly unlikely" that the state would seek federal aid).

low invested Congress with absolute power to enact such special legislation without the necessity of a rational basis to justify the distinctions created by the statute. Because of the importance of the issue raised by the decision below, this Court should grant a writ of certiorari.

There is an additional reason why certiorari should be granted. The decision below is in conflict with the opinion of Judge Wright in *D.C. Federation of Civic Associations* v. *Volpe*, 434 F.2d 436 (D.C. Cir. 1970).[15] In that case, the court considered § 23 of the Federal-Aid Highway Act of 1968 which related to certain specified highways in the District of Columbia. The language of that section appeared to exempt those highways from any federal environmental requirements as well as the requirements for public hearings. Judge Wright rejected that interpretation, however, because it would render the statute unconstitutional. He said:

> "The point here is that Congress, having by statute accorded all citizens the right to participate in the determination of highway projects, may not deny District citizens alone that right without adequate justification for this discrimination." 434 F.2d at 442, n. 28.

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[15] The case was resolved on a question of statutory interpretation. Neither of the other two judges on the panel joined in that portion of Judge Wright's opinion dealing with the constitutional question. One judge took no position on the constitutional issue; the other found the statute constitutional.

After examining the effect of such an exemption he concluded:

> "We think that the interpretation of Section 23 which appellees [the highway officials] urge would unnecessarily deny District residents important personal rights granted by Title 23 to citizens elsewhere in the United States." 434 F.2d at 440.

He continued:

> "Because the resulting classification would deprive only an already voiceless minority of its important personal right to contest disruptive highway projects enjoyed by citizens generally, we conclude that we would be hard pressed to find on this record reasons adequate to sustain the 'heavy burden of justification' necessary to support the discrimination which would result from appellees' interpretation of Section 23." 434 F.2d at 443.

The decision below is in clear conflict with Judge Wright's opinion. The court below refused to review § 154 under equal protection standards; Judge Wright not only held that a strikingly similar statute was subject to review under those standards, but found that it would be unconstitutional if interpreted to exempt highways in the District of Columbia from requirements to which all other federal-aid highways were subject.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1974

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1231

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY ET AL.,
Plaintiffs-Appellants,

v.

THE TEXAS HIGHWAY DEPARTMENT ET AL.,
Defendants-Appellees.

July 5, 1974

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

This much litigated and important environmental case has been in the courts for more than six years and is now before us for the second time. The complaint seeks to enjoin the construction of an expressway which would pass through parklands in the City of San Antonio, Texas. Plaintiffs are named individual members of the San Antonio Conservation Society, and the defendants are The Texas Highway Department, an administrative agency of the State of Texas, acting by and through the Texas Highway Commission, consisting of DeWitt C. Greer, Herbert C. Petry, Jr., and Garret Morris, and the State Highway Engineer, J. C. Dingwall, termed "state

defendants"; and The Federal Department of Transportation, an administrative agency of the United States of America, acting by and through John A. Volpe, Secretary of Transportation; F. C. Turner, Administrator, Federal Highway Administration; R. R. Bartlesmeyer, Director, Bureau of Public Roads; A. C. Taylor, Regional Administrator, Federal Highway Administration; and J. F. Cary, Division Engineer, Bureau of Public Roads, termed "federal defendants." [1]

The question for decision is whether the congressional enactment of section 154 of the Federal-Aid Highway Act of 1973, severing all federal connection with the San Antonio North Expressway, removes that project from the necessity for compliance with the provisions of the National Environmental Policy Act (NEPA) (42 U.S.C. § 4331 et seq.)[2] and sec-

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[1] Each of said persons is also defendant herein as an individual, for acts outside the authority delegated to that defendant, respectively, by the State of Texas and by the United States of America.

[2] Section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332, provides in pertinent part:

> * * * [A]ll agencies of the Federal Government shall—
>
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

[Footnote continued on page 3]

tion 4(f) of the Department of Transportation Act (49 U.S.C. § 1653(f)).[3]

Our prior decision (446 F.2d 1013 (1971)) reversed a summary judgment in favor of defendants and held that there had been a failure to comply

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[2] [Continued]

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

[3] 49 U.S.C. § 1653(f) reads as follows:

(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

with the provisions of NEPA and section 4(f) before proceeding with construction of the Expressway. We remanded the case with directions to the district court that it be held until the Secretary of Transportation had complied with his statutory responsibilities after which the district court was to conduct a full review of the matter. In the meanwhile, we ordered that "[c]onstruction shall not proceed until there has been full compliance with the law." *Id.*, at 1029.

The San Antonio North Expressway has been projected since 1959. The disputed segment is approximately six miles long, running about north and south through the middle of the City of San Antonio, and extends between Interstate Loop 410 and Interstate Highway 35. The controversy arises out of the fact that it will traverse portions of the Brackenridge-Olmos Basin Parklands. Its proponents stress the imperative need to solve serious traffic problems of the city; its opponents do not wish it to go through the beautiful Parklands in mid San Antonio. Some time after our initial decision in this case, Congress enacted the Federal-Aid Highway Act of 1973. Section 154 of that Act is directly applicable to the Expressway here, and reads in full as follows:

> Sec. 154. (a) Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project.

(b) The amount of all Federal-aid highway funds paid on account of sections of the San Antonio North Expressway in Bexar County, Texas (Federal-aid projects numbered U 244 (7), U 244(10), UG 244(9), U 244(8), and U 244(11)), shall be repaid to the Treasurer of the United States and the amount so repaid shall be deposited to the credit of the appropriation for "Federal-Aid Highways (Trust Fund)". At the time of such repayment the Federal-aid projects with respect to which funds have been repaid and any other Federal-aid projects located on such expressway and programed for expenditure on such project, if any, shall be canceled and withdrawn from the Federal-aid highway program. Any amount so repaid, together with the unpaid balance of any amount programed for expenditure on any such project shall be credited to the unprogramed balance of Federal-aid highway funds of the same class last apportioned to the States, respectively. The amount so credited shall be available for expenditure in accordance with the provisions of title 23, United States Code, as amended.

It is undisputed that in conformity with section 154 the State of Texas has returned to the Federal Government all federal-aid funds which it received on account of the Expressway and that it will receive no other federal funds in the future to aid in its construction. All funds received have been restored to the Federal Government and reapportioned among the States. By congressional enactment the Expressway is now entirely a state-financed project.

Upon the passage of section 154 the Federal Government and the State of Texas both moved the district court to dismiss plaintiffs' suit on the ground that removal of all federal funding by Congress exempted the project from compliance with the environmental provisions of NEPA and section 4(f). Plaintiffs contended, however, that passage of section 154 did not exempt the Expressway from the requirement that state and federal officials comply with federal environmental statutes specifically designed to protect parklands, especially NEPA and section 4 (f). Plaintiffs argued that these statutory requirements are still applicable (1) because the Expressway would traverse an area in which U.S. Army Corps of Engineers' approval would be required, thus constituting a "major federal action" under 42 U.S.C. § 4332(2)(C) and necessitating an environmental impact statement; (2) because the Expressway was only a small portion of a larger federal-aid network and inextricably related thereto; (3) because it would cross the San Antonio River said to be navigable and for which a U.S. Coast Guard permit would be required, another "major federal action"; and (4) if section 154 did exempt the project, it violated the due process clause of the U.S. Constitution.

The district court ruled adversely to the plaintiffs on all of these issues and held that the San Antonio North Expressway was exempt from the requirements of the federal environmental laws by virtue of the congressional enactment of section 154, which was not unconstitutional. Summary judgment was granted in favor of defendants and plaintiffs bring this appeal. A large volume of evidence, affidavits, depositions, and exhibits was filed by the parties in con-

nection with the motions, and there does not appear to be any serious dispute as to the facts. It is the law as to which the parties have stressed their principal arguments and on which they differ.

We stayed the district court order pending consideration of this appeal.

I.

Plaintiffs contend that section 154 does not in its terms specifically exempt the North Expressway from NEPA, section 4(f) or any other federal law, and the fact that the North Expressway is now exclusively a Texas state highway project is not dispositive of the environmental issues. They argue that if Congress intended this result it should have expressly stated it in section 154.

Following this premise the plaintiffs urge that the Expressway will pass through the San Antonio Channel Improvement Project over which the Army Corps of Engineers has jurisdiction, such as, for example, the Olmos Dam and Reservoir situated in the Olmos Basin Parklands which they aver are portions of the Channel Improvement Project.[4] Plaintiffs contend that the State Highway Department must obtain the Army Corps' approval for the Expressway to cross the San Antonio River at Josephine Street and also to traverse the Olmos Dam and Reservoir

[4] The Olmos Reservoir is not included in the Channel Improvement. *See* H.R.Doc.No.344, 83d Cong., 2d Sess. 46, 49 (1954). The Expressway therefore passes through the San Antonio Channel Improvement Project only at the crossing of the San Antonio River and Josephine Street, and there is no project right of way in this area.

area. They aver that the prior 1968 approval thereof by the Army Corps is outdated because there have been material changes in the design of the Expressway since that time. Finally they contend that the Army Corps' approval will constitute a "major federal action" and thereby trigger the provisions of NEPA relative to furnishing an environmental impact statement. The defendants, Federal and State Governments, respond that the plain language of section 154 as well as the legislative history make it clear that Congress intended to exempt the North Expressway from the environmental requirements of federal law. They contend that the Army Corps' approval of the project insofar as the river crossing at Josephine Street and traversing the Olmos Dam and Reservoir are concerned is not required by statute, regulation, or otherwise and that the Corps has no authority to approve or disapprove the Expressway.

We agree with defendants. Section 154(a) clearly states that "*Notwithstanding any other provisions of Federal law* or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended . . . and the expressway shall cease to be a Federal-aid project." (Emphasis added.) If Congress had not intended to exempt the Expressway from the environmental statutes, there would have been no purpose in passing the legislation. We cannot believe that Congress intended a vain and useless act. Any doubt about the matter, however, is fully resolved by the legislative history which shows without question that Congress drew the bill with the evident purpose of exempting the Expressway from the provisions of federal environmental laws including NEPA and sec-

tion 4(f).[5] The debates in the Senate and House disclose this unmistakably, as do the reports of the Senate and House Committees.[6] Federal control and

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[5] Section 4(f) requirement is no longer in the case since section 154 eliminated all federal funds on the Expressway and approval of the Secretary of Transportation is thus no longer required. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 407, 411, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

[6] See the Majority Report, Senate Public Works Committee, in pertinent part as follows:

> TERMINATION OF FEDERAL-AID RELATIONSHIP, SAN ANTONIO FREEWAY
>
> The San Antonio North Expressway would be terminated as a Federal-aid project and Federal funds programed for the State of Texas for that project would be returned to the United States Department of Transportation for reapportionment among the States. While congressional termination of Federal involvement in such projects is not unprecedented, the Committee recognizes that this is an unusual action and believes it is warranted only because of unusual circumstances.
>
> The project involves a non-Interstate urban expressway located wholly within the limits of the City of San Antonio which was planned and requested by that city in 1959. The State obtained initial route approval from the Federal Highway Administrator, purchased all rights-of-way, and completed all relocation with approximately $7 million in State and local funds prior to changes in Federal law which later involved it in legal controversy.
>
> The Secretary approved the letting of construction contracts prior to recent Federal court decisions defining the standard by which the administrative approval was to be reviewed. Thus the project has been affected twice by

subsequent changes in Federal law and procedures preventing its completion as a Federal-aid project.

As a result, $4 million in construction has been deteriorating and contractors have claimed an additional $4.5 million in damages against the State of Texas. Since the State and municipality have indicated the desire to complete the project with wholly local financing, the Committee believes that it would be proper to allow them to do so.

The Committee's recommendation is not intended to be an adverse comment on the Fifth Circuit Court of Appeals decision of August 5, 1971, setting forth the administrative procedures required of the Secretary of Transportation in approving Federal-aid projects, nor would it prevent future litigation in State court. Its only effect would be to ratify the action of the Secretary of Transportation in accepting the Federal funds already returned by the State and to terminate the Federal-State relationship on the project.

The Committee heard extensive evidence about the project, studied the proposed route and is satisfied that it would not involve significant damage to recreational areas.

S.Rep. No. 93-61, 93d Cong., 1st Sess. 23, 54-56 (1973). (*See also* Senator Buckley's individual views in opposition to passage of the bill added to the Senate Report in which he urges rejection because it would have an effect on NEPA and section 4(f). The reports of both the Senate and House Committees on Public Works in 1972 when the bill was pending are to the same effect. They contain the following significant language:

> Prior to granting such approval the Committee studied the proposed route and is satisfied that it does not involve significant damage to recreational areas.

S.Rep. No. 92-1081, 92d Cong., 2d Sess. 42, 43 (1972); H.R. Rep. No. 92-1443, 92d Cong., 2d Sess. 33 (1972).

See also Hearings on S. 502 Before Subcomm. on Transportation of the Senate Public Works Comm., 93d Cong., 1st Sess.

involvement thus came to an end with enactment of section 154.[7]

Nor was approval of the Expressway by the Army Corps of Engineers necessary so as to constitute a "major federal action" and trigger the provisions of NEPA relative to the requirement of an environmental impact statement before the Expressway can proceed. The Olmos Dam and Reservoir areas and the Josephine Street crossing area are not within Corps jurisdiction or authority. No rights of way have been acquired in the area.[8] As the Corps'

372-481 (1973); Hearings on 1973 Highway Legislation (Future Highway Needs) Before Subcomm. on Transportation of the House Public Works Comm., 93d Cong., 1st Sess. (1973); S.Rep. No. 93-61, 93d Cong., 1st Sess. (1973); 119 Cong.Rec.S. 4934—S. 4943 (daily ed. March 15, 1973); 119 Cong.Rec.H. 7418 (Aug. 3, 1973).

The Senate debate in 1972 and 1973 also revealed quite clearly that the purpose of the proposed legislation was to exempt the Expressway from environmental control. *See* Senator Nelson's incorporation in the Congressional Record of memorandum of opponents' attorney, Mr. Vardaman; 118 Cong.Rec.S. 14843 (daily ed. September 13, 1972); also Senator Buckley's attempt to delete the provisions relative to the San Antonio Expressway from the Federal-Aid Highway Bill; 118 Cong.Rec.S. 14839—S. 14846 (daily ed. September 13, 1972); 119 Cong.Rec.S. 4724, S. 4726 (daily ed. March 14, 1973); 119 Cong.Rec.S. 4934—S. 4943 (daily ed. March 15, 1973). *See also* Hearings on 1973 Highway Legislation (Future Highway Needs) (93-5) Before the Subcommittee on Transportation of the Committee on Public Works of the House of Representatives, 93d Cong., 1st Sess. (March 19-23, 1973).

[7] *Cf.* Ely v. Velde, 4 Cir., 1974, —— F.2d ——.

[8] Corps regulations (33 C.F.R. §§ 208.10 et seq.) require approval only if construction is proposed within the limits of the project right of way. Thus they are inapplicable here.

witness testified, it would not be able to approve the Expressway plans because there is no Corps project there at the moment.[9] The Corps' opinion was sought by the Texas Highway Department as to whether the project would cause any adverse effect on flood control, and the state was informed that there was no objection though it was not something within the right of the Corps to approve or disapprove. It does not appear that there is any legal requirement that the state obtain Corps' approval.

Thus this case differs from those cited by plaintiffs where federal official approval was necessary, being required by statute, such as Citizens Committee for Hudson Valley, S.D.N.Y.1969, 302 F.Supp. 1083, aff'd 2 Cir., 425 F.2d 97, cert. denied, 400 U.S. 949,

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[9] In the deposition of George Demeritt, Corps of Engineers, the following testimony is of interest on the question of Corps' approval of the project:

BY MR. ROSENBERG:

Q. Presuming that you were to receive the final plans for the Josephine area, what would be the basis for your review in point, if you received these plans today?

BY MR. DEMERITT:

A. We would review them based on the latest study plan that we would have for the Corps project, which, at present, is the preliminary plans and determine whether our floodway could—they could be incorporated into our floodway plan.

We would make any suggestions we might have that might assist us in our plan, but we would not be able to approve them, because we have no project there at the moment.

91 S.Ct. 237, 27 L.Ed.2d 256 (1970), and Zabel v. Tabb, 5 Cir., 1970, 430 F.2d 199, cert. denied, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971), where Army Corps of Engineers' approval was statutorily required; also, as in Davis v. Morton, 10 Cir., 1972, 469 F.2d 593, where the Secretary of the Interior was required by statute to ratify or reject leases on Indian reservations. In those cases the Federal Government's role was one of control—or primary jurisdiction—unlike the present case. We find no merit, therefore, in this contention of plaintiffs.

II.

Plaintiffs' second contention is that the Expressway is only a small portion of a larger federal-aid highway network and that even though this segment is to be constructed exclusively with state funds, NEPA must still be complied with by the state. Plaintiffs contend that practically every vehicle using the Expressway will enter or exit from the federal-aid route. Therefore, they argue that the North Expressway is basically a part of one federal-aid highway. Nevertheless, we cannot ignore the fact that Congress, by section 154, specifically determined that the North Expressway was not to be a federal project. The court below also held that the North Expressway has an independent utility of its own. The Federal Government argues that the congressional enactment of section 154 answers and disposes of this issue since there has now been an express congressional determination that the North Expressway is not a part of a larger federal project. It is true that the Expressway connects with other federal interstate highways at the north and south ends thereof,

but defendants point out that virtually every road in the country crosses or interchanges with federal-aid highways, and that there are many state-constructed roads which do not form a part of the federal network. The independent utility of the Expressway is found in its connection of downtown San Antonio with the airport and in its primary purpose to relieve the serious traffic problem in central San Antonio. Accordingly, we hold that the Expressway is properly considered independently of the interstate routes with which it connects.

We approve, therefore, the conclusion of the district court (Judge Roberts), well expressed in this regard as follows:

> While the North Expressway will, coincidentally, provide a link in the interstate highway system in San Antonio, this is not to be its major function. Indeed, a primary reason for the perseverance of the State in its efforts to build the North Expressway is the interest the people of San Antonio have in the completion of this project, an interest which derives not from the coincidental function of the North Expressway as a link in the interstate highway system, but rather from the perceived need for the North Expressway as a major artery of intra-urban transportation. Thus, the North Expressway has an "independent utility of its own," *Id.*, which justifies its consideration separately from surrounding projects for purposes of NEPA. The undisputed facts are that this project is to be financed with non-federal funds, designed and built without federal approval or authorization, and to serve primarily local needs. We cannot conceive this

project to be a "major Federal action" within the contemplation of 42 U.S.C. § 4332(2)(C). We conclude, therefore, that no environmental impact statement is necessitated by the relationship of the North Expressway to the interstate highway system.

III.

The issue posed by plaintiffs on the navigability *vel non* of the San Antonio River is now moot. The Army Corps of Engineers made its determination on March 8, 1974 in which it concluded that the San Antonio River at the points involved in this case should not be regarded as a navigable water of the United States. Plaintiffs' contention that U.S. Coast Guard approval is required for a bridge to cross the river must, therefore, fail.

IV.

Plaintiffs finally contend that if Congress' enactment of section 154 did exempt the North Expressway such action violates the due process clause of the U.S. Constitution by arbitrarily discriminating against plaintiffs and depriving them of rights under federal environmental statutes. They argue that such fundamental federal rights are available to all other citizens in the nation in similar circumstances and that Congress has without any justification deprived them of such rights. They aver that there is no basis for treating the Expressway any differently "from any other federal-aid highway that threatens urban parklands." (Appellants' brief, p. 40.)

The short answer to this contention is that by virtue of section 154 the North Expressway is no

longer a federal-aid highway and that the same Congress which enacted the environmental statutes to which plaintiffs refer, concluded to exempt this segment of highway from these laws. The federal-aid highway program was established by Congress and there is no reason apparent why it cannot decide which roads of the nation shall be included in the system. The environmental statutes were designed to apply to federal projects. The Expressway is now a state highway, not a federal highway. Its former federal status has been terminated by act of Congress. Congress having spoken in the matter, we see no reason to attempt to override the solemn expression of its will found in the enactment of section 154.

V.

Plaintiffs have also sought an award of attorneys' fees in this case. They were successful in reversing the judgment of the district court when we first considered the case on appeal and remanded it. After passage of the Federal Aid Highway Act of 1973, they have been unsuccessful both in the lower court and in this court by our decision herein. They request, however, as a minimum that they be awarded attorneys' fees through the first appeal. Obviously such an award would be substantial, considering the circumstances of this litigation.

They seek such an award against the state defendants, The Texas Highway Department, an administrative agency of the State of Texas, acting by and through the Texas Highway Commission, consisting of DeWitt C. Greer, Herbert C. Petry, Jr., and Garret Morris, and the State Highway Engineer, J. C.

Dingwall. It is conceded that the federal defendants are immunized from an award of attorneys' fees by provisions of 28 U.S.C. § 2412.[10]

The claim for attorneys' fees is asserted under the so-called "private attorney general" theory in that plaintiffs contend they were effectuating important congressional policy by prosecuting this suit.[11] Plaintiffs do not contend that their efforts in this environmental case have been made inordinately difficult by actions of defendants taken in bad faith or for oppressive reasons. There is, accordingly, no indication of unreasonable or obdurate obstinacy or vexations or groundless conduct.

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[10] 28 U.S.C. § 2412 reads as follows:

§ 2412. Costs

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States. As amended July 18, 1966, Pub.L. 89-507, § 1, 80 Stat. 308.

[11] It is clear that no such claim can be properly made as to this appeal because our holding is predicated upon the carrying out of congressional policy as enunciated by the Federal-Aid Highway Act of 1973, section 154.

The state defendants respond that sovereign immunity of the State of Texas by virtue of the Eleventh Amendment to the Constitution has also immunized them from an award of attorneys' fees. The recent case of Edelman v. Jordan, —— U.S. ——, 94 S.Ct. 1347, 39 L.Ed.2d 662, decided by the Supreme Court on March 25, 1974, is cited by the state defendants in support of this contention. It is apparent that any award for attorneys' fees must be paid from the general revenues of the State of Texas. Under the *Edelman* rationale "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." [12] *Edelman, supra,* —— U.S. ——, 94 S.Ct. at 1356. Cases in which attorneys' fees were awarded because of bad faith or obdurate obstinacy, or under the private attorney general theory against non-state defendants, are clearly inapposite. The claim for attorneys' fees, even if limited to services through the first appeal of this case, is, therefore, barred.

Conclusion

This controversy has now "been resolved in the Halls of Congress, which is the proper place in our system of Government for priority decisions to be

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[12] Nor would there be any difference in principle because some of the defendants are state officers rather than the state itself since the state's Eleventh Amendment immunity would still prevail. *See Edelman,* —— U.S. at ——, 94 S.Ct. at 1362. *See also* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945).

made." 446 F.2d at 1024. We therefore defer to the will of Congress and give effect to its solemn enactment. Here the litigation should end.

Affirmed.

TUTTLE, Circuit Judge (concurring in part and dissenting in part):

While I concur fully with the opinion with respect to the claim on the merits, I respectfully dissent with respect to the disposition of the issue of attorneys' fees. Since the trial court did not enter any order with respect to the claim for attorneys' fees, I would remand that issue to the trial court to enable it to determine first the extent to which any award might be a charge against state revenues as distinguished from being merely a charge against the individual named defendants.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1973

No. 74-1231

D.C. Docket No. CA-67-72-A

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL.,
Plaintiffs-Appellants,

versus

THE TEXAS HIGHWAY DEPARTMENT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court in this cause be, and the same hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

July 5, 1974

TUTTLE, Circuit Judge, concurring in part and dissenting in part.

Issued as Mandate: Sep. 9, 1974.

CLERK'S NOTE: This mandate is limited to the extent set out in the Court's order of August 29, 1974, copy of which is attached hereto.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1231

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY ET AL.,
Plaintiffs-Appellants,

v.

THE TEXAS HIGHWAY DEPARTMENT ET AL.,
Defendants-Appellees.

Aug. 29, 1974

Appeal from the United States District Court for the Western District of Texas; Jack Roberts, Judge.

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

(Opinion 7-5, 1974, 5 Cir., 1974, 496 F.2d 1017)

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll limited to the question of the allowance of attorney's fees requested in this case, and a majority of the Judges in active service having voted in favor of granting a rehearing en banc solely on this issue, IT IS ORDERED that this issue of the request for attorney's fees shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc on the remaining issues [Rule 35 F.R.A.P.; Local Fifth Circuit Rule 12], the petition for rehearing and suggestion of rehearing en banc in all other respects is denied.

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF TEXAS
AUSTIN DIVISION

Civil Action No. 67-72-A

[Filed Dec. 10, 1973, Dan W. Benedict, Clerk,
By: [Illegible], Deputy]

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL.

v.

THE TEXAS HIGHWAY DEPARTMENT, ET AL.

MEMORANDUM OPINION AND ORDER

This case brings once more before the Court the much litigated fate of the San Antonio North Expressway. On August 13, 1973, the President signed the Federal-Aid Highway Act of 1973. Section 154 (a) of that Act provides that the North Expressway shall cease to be a federal-aid project. Section 154(b) of the Act provides that all funds paid to the State for the project shall be repaid to the Treasurer of the United States, and that all funds programmed for the project shall be withdrawn from the federal-aid highway program, and "credited to the unprogrammed balance of the Federal-aid highway funds of the same class last apportioned to the States, respectively. The amount so credited shall be available for expenditure in accordance with the provisions of title 23, United States Code, as amended."

The legislative history of the Act clearly shows that Congress intended to exempt the North Expressway from the application of the National Environmental Policy Act (NEPA) and Section 4(f) of the Department of Transportation Act. Thus, Congress has chosen to withdraw, as to this project, its "solemn expression of Congressional will to preserve parklands and the environment from harm or destruction," of which Judge Thornberry spoke in considering this case once before. 446 F.2d 1013, 1014 (5th Cir. 1971). This is so as to "all portions" of the North Expressway between Interstate Highway 35 and Interstate Loop 410.

Armed with this Congressional mandate, the State Defendants have filed a Suggestion of Lack of Jurisdiction, Motions to Dismiss, and a Motion for Summary Judgment. The Federal Defendants have filed a Motion to Dismiss which was, pursuant to FED. R. CIV. PROC. 12(b), converted to a Motion for Summary Judgment. The Plaintiffs have responded by raising no fewer than five federal questions which they contend remain in this case. The Court has considered Plaintiffs' contentions and concluded that no genuine issues as to any material facts remain, and that Defendants are entitled to summary judgment.

In contesting the Defendants' motions, Plaintiffs raise five basic allegations:

1) That the State has not complied with the requirements of Section 154(b) of the Federal-Aid Highway Act of 1973;

2) That the North Expressway is so related to other federal-aid highway projects that federal environmental laws apply;

3) That the State has not obtained approval of the Army Corps of Engineers for construction of the North Expressway through the San Antonio River Authority Channel Improvement Project, over which the Corps has jurisdiction;

4) That the State has not obtained a bridge permit under 33 U.S.C. § 401 from the Coast Guard for that part of the North Expressway that crosses the San Antonio River; and

5) That Section 154 of the Federal-Aid Highway Act of 1973 violates the Due Process Clause of the Fourteenth Amendment.

1) *Compliance with Section 154(b) of the Act.* Section 154(b) of the Act provides that the North Expressway shall cease to be a federal-aid highway program when all funds heretofore paid the State and all funds programmed for expenditure on the project are returned to the unprogrammed balance of the federal-aid highway funds. The State had been paid some $1.8 million, and another approximately $3.5 million had been programmed for the project. The money actually paid the State has been repaid by the State, and the money that had been programmed for the North Expressway and the money repaid will, as stated in the affidavit of Deputy Federal Highway Administrator Ralph R. Bartlesmeyer, immediately following the next apportionment to be made on or before December 31, 1973, be withdrawn from the unprogrammed balance of funds apportioned to Texas for extensions of the federal-aid secondary systems within urban areas, and reapportioned among the States for urban extensions, in addition to the funds regularly apportioned for such purpose. Thus, the State has performed its obliga-

tion under Section 154(b) by repaying all funds received for the North Expressway project. Administrators of the federal program have committed themselves to this Court to perform the paper transaction required of them immediately after the next apportionment to be made by the end of this month. Plaintiffs have no cause for complaint.

2) *Relation of the North Expressway to other federal-aid highway projects.* Notwithstanding the cessation of the North Expressway's status as a federal-aid project, Plaintiffs contend that it is an integral part of the interstate highway system and, as such, a "major federal action," subject to NEPA. Under the undisputed facts of the case, the North Expressway will be both a significant link in the interstate highway system in San Antonio and a major artery for local traffic. We concur with the analysis of the Eighth Circuit Court of Appeals that the "crucial question" is whether the North Expressway is "an appropriate segment" to be treated separately from the adjoining federal-aid projects in determining whether an environmental impact statement is required by NEPA. *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11, 19 (8th Cir. 1973). The project here involved extends between Interstate Highway 35 and Interstate Loop 410. Thus, the project ends "in major termini, *i.e.* present major highways or cities." *Id.* While the North Expressway will, coincidentally, provide a link in the interstate highway system in San Antonio, this is not to be its major function. Indeed, a primary reason for the perseverance of the State in its efforts to build the North Expressway is the interest the people of San Antonio have in the the completion of this proj-

ect, an interest which derives not from the coincidental function of the North Expressway as a link in the interstate highway system, but rather from the perceived need for the North Expressway as a major artery of intra-urban transportation. Thus, the North Expressway has an "independent utility of its own," *Id.*, which justifies its consideration separately from surrounding projects for purposes of NEPA. The undisputed facts are that this project is to be financed with non-federal funds, designed and built without federal approval or authorization, and to serve primarily local needs. We cannot conceive this project to be a "major Federal action" within the contemplation of 42 U.S.C. § 4322(2)(C). We conclude, therefore, that no environmental impact statement is necessitated by the relationship of the North Expressway to the interstate highway system.

3) *Corps of Engineers approval.* Plaintiffs contend that under the ordinances of the City and the San Antonio River Authority (SARA), prior approval of the Corps of Engineers must be obtained for any improvements within the limits of the SARA right-of-way. The highway will cross the SARA right-of-way twice. The affidavit of Col. Floyd Henk, District Engineer for the Corps of Engineers, establishes that the Corps received and reviewed the plans for the North Expressway in 1968, prior to the effective date of NEPA on January 1, 1970. The Corps found that it had no objection to the North Expressway at that time; and Col. Henk's affidavit makes clear that the 1968 determination continues to stand as long as the highway plans reviewed in 1968 have not materially changed. Thus, we are not at this point faced with a federal action within

the application of NEPA. Whether Corps reevaluation of any materially changed plans at a later date might constitute a "major federal project," is a question not now before us. We hold only that no environmental impact statement was required for the Corps' 1968 review of the project, and that the continuing validity of that pre-NEPA assessment is not affected by the subsequent enactment of NEPA.

4) *Requirement of a bridge permit.* A bridge permit is required for any bridge over a "navigable river." 33 U.S.C. § 401. The record reveals that the San Antonio River has historically and consistently been considered to be non-navigable by Government authorities. Plaintiffs contend the Court should delay action until the Corps of Engineers completes a current reevaluation of what rivers and streams are to be considered navigable. This contention is without merit. The existing determination of non-navigability has not been superseded by any new finding. The Court has received no intimation of when the reevaluation might be completed. Moreover, we have been shown no substantial reason to believe that the new finding will be inconsistent with the heretofore unchallenged finding of non-navigability.

5) *The Due Process claim.* Plaintiffs contend they are being deprived of federally secured rights without due process of law. It should be noted that the federal environmental rights involved in this case are statutorily secured, and that the exemption of this project was accomplished statutorily. The decision was made through legitimate political processes, just as was the original decision to secure certain environmental rights. The Due Process Clause was

never intended to protect citizens from losing political or legislative battles when no constitutionally secured rights are threatened thereby.

The Court having found that no genuine issues as to any material facts exist and that, based upon the undisputed material facts, Defendants are entitled to prevail on the questions of federal law presented, summary judgment is appropriate as to all federal questions presented. No federal questions remaining in the case, the Court need not, and does not, reach the issues of State law only raised by Plaintiffs. It is accordingly

ORDERED, ADJUDGED and DECREED that Defendants' Motions for Summary Judgment be, and hereby are, GRANTED; and that judgment be entered for the Defendants, without prejudice to the consideration of any claims of Plaintiffs based solely upon State law.

Entered the 10th day of December, 1973, at Austin, Texas.

/s/ Jack Roberts
JACK ROBERTS
United States District Judge

82 Stat. 823

SEC. 18. (a) Section 138 of title 23, United States Code, is amended to read as follows:

"§ 138. Preservation of Parklands

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate [82 Stat. 824] and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

(b) Section 4(f) of the Department of Transportation Act (80 Stat. 931; Public Law 89-670) is amended to read as follows:

"(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

83 Stat. 853, 42 U.S.C. § 4332.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved

in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of title 5. United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

[83 Stat. 854]

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.